4

Issues to address

4.1 An overview of critical issues raised during the course of the inquiry is provided in this chapter. Discussion of labour hire and independent contracting is included.

4.2 Foremost was the need for greater clarity and consistency in the identification of the employee, independent contractor and labour hire worker. Identifying the employer to determine responsibilities is critical.

4.3 The majority of evidence regarding skills shortages and OHS issues related to the labour hire industry. However, concerns regarding the ability of independent contractors to improve skills were raised, as well as a description of pressures on contractors to meet targets rather than strictly adhere to safety requirements. The complexity of workers' compensation and the state variation was of particular note.

4.4 Discussion of strategies to ensure that there is better adherence to employer obligations and safety requirements concludes the chapter. Registration, licensing and an industry wide code of practice were proposals suggested.

4.5 The Committee also acknowledges that greater clarity is required around other issues such as superannuation. Further discussion on the need for clarity of responsibilities in relation to taxation is discussed in the following chapter.

Definitions/identification of worker status

Employee or independent contractor

4.6 As discussed in Chapter 2 there has been substantial debate on the need for improved definitions of employee, independent contractor and employment. The three approaches to address this debate include the common law approach, the legislative approach, and the personal services income taxation approach.

4.7 DEWR summarises:

- The common law approach
  - ⇒ The common law has traditionally maintained a distinction between 'employees' and 'independent contractors'. Employees are engaged under a contract of service whereas independent contractors are engaged under a contract for service. The courts have adopted a multi-factor (indicia) test to determine whether a person is an employee or an independent contractor. DEWR stated that common law allows greater flexibility than legislation and provides an effective mechanism to address 'sham' arrangements.
- Legislative approach – statutory definition
  - ⇒ Subsection 4(1) of the WR Act uses the common law meaning of employee, as it does for 'independent contractor' (subsection 4(1A)). Other Commonwealth, state and territory legislation adopt different definitions, specifying what is an 'employee' or 'worker'.[1] It is argued by DEWR that if a statutory definition was adopted, it may be possible to subvert the legislature's intention using legal pretences.
- Personal services income (PSI) approach
  - ⇒ This approach suggests that to determine an independent contractor's status, a person is an independent contractor if they are currently recognised as a Personal Services Business under the *Income Tax Assessment Act 1997*. A disadvantage to this approach is that the definition would not be simple or clear.[2]

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1 See for example: Qld Government, *Submission No. 66*, Qld *Industrial Relations Act 1999* for a broad definition, p. 34; DEWR, *Exhibit No. 25*, p. 18 referring to the SA *Industrial and Employee Relations Act 1994*; HIA, *Submission No. 61*, p. 5 referring to the *Superannuation Guarantee (Administration) Act 1992* (Cth), s.12(3).

2 DEWR, *Exhibit No. 25*, pp. 13-14.

4.8 In evidence to the Committee the advantages and disadvantages of these approaches were debated and are considered fundamental to any further consideration of a legislative response.

Common law approach

4.9 There is significant support for the continuation of the common law approach. One business association stated that difficulties in agreeing to a changed definition, and the costs involved once that change was made, were considered paramount.[3] Continuation of the status quo was advocated by the NFF. They support relying on a basic statutory minimum and letting the parties pursue actions through applying common law. The common law test is useful to determine the situation by using a check list.[4] See Appendix E for a review of the differences.[5]

4.10 The Australian Chamber of Commerce and Industry (ACCI) states that the starting point should be recognition that the common law provides appropriate definitions. [6] If there is to be codification then this should be based on the common law distinctions.

4.11 The Law Council of Australia's view is that the common law control test works well in most circumstances. They state that in the majority of cases the situation is quite clear cut. It is only unclear in borderline cases where relationships might have been established that are not entirely bona fide, or in complicated circumstances.[7]

4.12 The Victorian Government stated that the discussion on whether it is possible to produce a workable definition of employee for industrial relations purposes should continue, but doubts the value of trying to define an independent contractor.[8] They comment that:

> Pending any consensus on this issue, however, the common law definition should continue to be the determinant of the line between employees and independent contractors. One of

3 Mr G. Blyth, CCI WA, *Transcript of Evidence*, 20 May 2005, pp. 4-5.

4 Mrs. D. Wawn, NFF, *Transcript of Evidence*, 9 May 2005, p. 12.

5 Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* accessed 22 June 2005, <www.oea.gov.au/docs/contractorvsemployee.pdf>.

6 Mr P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, pp. 8-9. See also Mr P. Bosa, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 66; Mr D. Houlihan, IR Australia, *Transcript of Evidence*, 31 March 2005, p. 82.

7 Mr T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, pp. 58-59.

8 Vic. Government, *Submission No. 71*, pp. 26-28.

> the advantages of the common law definition is that it is by its nature already "nationally consistent".[9]

4.13 However, a significant number of organisations and individuals indicated that greater clarity and consistency were required,[10] and some governments supported such efforts.

4.14 Professor Andrew Stewart argues that the current common law definitions should be replaced with a more extensive definition of employment. His criticism of the current system mainly rests on the abuse of the standard employee-employer relationship. This may be instigated by the employer, possibly by the worker, or by both parties for financial gain and the avoidance or shifting of responsibilities.[11] Further Professor Stewart describes the approach of courts and tribunals as:

> … necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee.[12]

Legislative approach – statutory definition

4.15 Although some organisations and individuals advocated the need for greater clarity and consistency, few were able to provide greater detail on how this might be achieved, apart from reference to the PSI taxation definitions.

4.16 Possible solutions have been adopted by various legislators to address 'employment–like' arrangements. These include 'deeming' workers in various occupations to be employees for specific purposes. This will be discussed further in a later section. Changes to the tax system and provisions in unfair contracts provisions have also been suggested as possible solutions.

4.17 However, Professor Stewart argues that these other responses are superficial and a more effective approach would be to deal with the

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9 Vic. Government, *Submission No. 71*, p. 29.

10 For example see Prof. A. Stewart, *Submission No. 69*, p. 17; HIA, *Submission No. 61*, p. 14; MBA, *Submission No. 22*, pp. 17-18; Building Service Contractors Association of Australia, *Submission No. 16*, p. 4; Vic. Government, *Submission No. 71*, pp. 28-29; Qld Government, *Submission No. 66*, p. 8.

11 Prof. A. Stewart, *Submission No. 69*, pp. 2-4.

12 Prof. A. Stewart, *Submission No. 69*, p. 5.

source problem.[13] That is to adopt a standard or model definition of employment that can be included in any legislation, state or Commonwealth, where it is considered necessary to apply obligations or extend entitlements, but not to apply to those genuinely in a business of their own account.[14]

4.18 It is not suggested that the definition should be universal but that there needs to be greater congruence and certainty in drawing a more realistic boundary.[15] This is required by business groups to reduce the variation that is present with deeming provisions.[16]

4.19 A definition suggested by Professor Stewart provides that:

- the onus is on the denial of the existence of an employment relationship, and to show that the worker is genuinely carrying on a business;
- factors need to be set out and considered.;[17]
- factors should include three of the four tests adopted in the PSI legislation (employment, unrelated clients and business premises tests). It does not include the proportion of income asked over one year ('the 80/20 rule') to remove the time factor requirements;[18]
- an additional paragraph focuses on employment agencies such as in labour hire to clarify the agency as the employer. The final paragraph seeks to address the use of interposed entities such as personal companies and family trusts.[19] (Refer to Appendix G for further information on a definition proposed by Professor Stewart.)

4.20 Further discussion of these issues occurs later in the report in sections: Responsibilities – who is the employer, and Business structures.

4.21 AMWU supports the further extension and clarification of the statutory definition of the employment relationship. In particular the AMWU supports similar definitions proposed by Professor Stewart to ensure that independent contractor (and labour hire) arrangements

13 Prof. A. Stewart, *Submission No. 69*, p. 9; See also Mr. T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, p. 62.

14 Prof. A. Stewart, *Submission No. 69*, pp. 8-9.

15 Prof. A. Stewart, *Submission No. 69*, pp. 8-9.

16 See for example Ai Group, *Submission No. 49*, pp. 24-25.

17 Prof. A. Stewart, *Submission No. 69*, pp. 10-11.

18 Prof. A. Stewart, *Submission No. 69*, p. 12.

19 Prof. A. Stewart, *Submission No. 69*, p. 12.

are not used inappropriately to evade the rights and obligations attached to the employment relationship.[20]

4.22 In support of an independent contractor definition MBA state that independent contractor legislation should include three components to identify an independent contractor:

- a codification of the common law test as the basis for the distinction between a contractor and an employee;
- an external indicator of status such as a personal services business determination; and
- registration for meeting the above requirements with a Commonwealth agency.[21]

4.23 The first two of the MBA components have been echoed in Professor Stewart's incorporation of components of the indicia of the common law approach but with an extended definition using the personal services income tests. The third component of a registrar will be discussed later in Chapter 6.

4.24 However, there is criticism of a definitional approach to improving clarity and certainty of employee or independent contractor status. ICA states that reliance on redefining 'employment' will not lead to the desired outcomes.[22]

4.25 The Law Council of Australia comment that definitions have their own problem: it can be very difficult to draft something that picks up all circumstances.[23] While the Victorian Government support the drive for nationally consistent and workable definitions, they express support for the maintenance of the common law approach at this stage, with some qualifications, noting that:

> … any new statutory definition is not likely to alter the practical reality that parties will still go to the courts to determine which side of the line of a stated formulation they fall on, regardless of whether that formulation is set down by a court or in a statute.[24]

4.26 In response, the Committee notes that this is possible with any legislative change. The responsibility for improving clarity and

20 AMWU, *Submission No. 46*, p. 75.
21 MBA, *Submission No. 22*, pp. 17-18.
22 ICA, *Submission No. 20*, p. 18.
23 Mr. T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, p. 62.
24 Vic. Government, *Submission No. 71*, p. 28.

certainty in the longer term for employees, independent contractors and business should not be avoided.

Personal services income approach

4.27 A range of organisations considered components of the personal services income rules to be of benefit in differentiating between employees and independent contractors.[25] The taxation definition has similar elements to the common law approach, for example providing one's own tools, and the capacity to delegate.

4.28 The *Income Tax Assessment Act 1997* provides that certain independent contractors are to be taxed as employees (though the legislation indicates that they do not become an employee for any other purposes).[26] However, they will not be taxed as employees if they are found to be running a personal services business, which will be the case if any of the following applies:

- they satisfy the 'results test' for at least 75 per cent of income, that is:
  - ⇒ they work to produce a specified result or outcome(s) under the contract or arrangement;
  - ⇒ they provide the tools and equipment necessary (if any) to produce the result(s) (if no tools or equipment are required they meet this component of the test); and
  - ⇒ they are liable for the cost of rectifying any defective work;
- less than 80 per cent or more of personal services income (PSI) in an income year comes from each client and must meet one of the other three personal services business tests. These are the:
  - ⇒ unrelated clients test: having two or more unrelated clients; or
  - ⇒ employment test: having employees or subcontractors that perform 20 per cent of the work, or apprentices for at least half of the year; or
  - ⇒ business premises test: having business premises that are physically separate from their home, or from premises of the person for whom they are working; or

25 For example see HIA, *Submission No. 61*, p. 6; Ross Human Directions, *Submission No. 54*, p. 3; Courier and Taxi Truck Association; *Submission No. 50*, Attachment 2, p. 5.

26 *Income Tax Assessment Act 1997* (Cth) Divs 84-87, as originally introduced by the *New Business Tax System (Alienation of Personal Service Income) Act 2000*.

- receive a personal services business determination from the Commissioner of Taxation .[27]

4.29 This also applies whether the income is received directly by the individual independent contractor or is received by a company, trust or partnership (personal services entity). One criticism with this approach of using the PSI definition to identify independent contractors is that it is more restrictive than the common law approach; and that independent contractors at law would become employees for the purpose of workplace regulation.[28]

4.30 HIA supports the use of the 'results test' as used in the PSI legislation. They suggest that tax status is an important business indicator, and ensures that 'independent contractor status is not awarded to those who are really employees and should be paying tax under PAYG'.[29]

4.31 HIA consider that instead of defining 'employee' the PSI tests identify who is an independent contractor, and therefore not an employee. They suggest that this leaves the common law untouched, and does not require forming additional definitions in legislation. They provide an example where this approach has been used in the Queensland *Workcover Act* in 2002 to exclude independent contractors from being considered as an employee:

> 'Notwithstanding anything contained elsewhere in this or any other Act, a person who is recognised as a Personal Services Business for the purposes of Division 87 of the Income Tax Assessment Act 1997 is not to be taken to be a worker/employee for the purposes of this Act, and a second person contracting with them is not to be taken as their employer.'[30]

4.32 This then enables independent contractors to be excluded from other legislation that is designed for an employment relationship. Ross Human Directions (a labour hire agency) also supports the use of the Australian Tax Office (ATO) definition, except for the timeframe for the assessment of the 80/20 rule. They indicate that this should be increased to reflect the existence of long-term project lengths.[31]

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27 DEWR, *Exhibit No. 25,* pp. 13; ATO, *Step by step guide – personal service income*, accessed 7 June 2005, <www.ato.gov.au/print.asp?doc=/content/33827.htm>.

28 DEWR, *Exhibit No. 25,* p. 13.

29 HIA, *Submission No. 61*, p. 14.

30 HIA, *Submission No. 61*, p. 15.

31 Ross Human Directions, *Submission No. 54*, p. 3.

4.33 The NSW Government also considers that the use of PSI tests included with the *Income Test Assessment Act 1997* (Cth) could be used to identify independent contractors.[32]

4.34 However, criticisms of adopting the personal services income approach is that the development of the taxation definition was for revenue considerations and was not designed for workplace relations purposes.[33] (Further consideration of taxation issues occurs later in Chapter 5, under Business structures.)

4.35 One approach to deal with a possible changing definition is to fund test cases to ensure that determinations are set and the cost is not borne by businesses and individuals. This approach has been adopted for example by the ATO in the applicability of anti-avoidance provisions for independent contractors.[34]

Responsibilities – who is the employer?

4.36 One of the important issues in the discussion is determining 'who is the responsible employer?' Disputes have arisen over who is the responsible employer (the host or the labour hire agency) or, if a contractor is involved, whether there is in reality an employer.

4.37 As mentioned in Chapter 3, the 'standard' arrangement is that the worker at the site is under the direction or control of the host business, but it is the labour hire agency that has responsibility for the wages and other on-costs of the worker. The host business pays the labour hire agency for providing the labour and thus has a contractual relationship with the labour hire agency.[35]

Joint employment

4.38 Joint employment allows an employee to be employed by more than one employer at the one time. Joint employment arose in the United States in the 1930s as a statutory response to labour hire arrangements being used to avoid collective bargaining laws and employee

32 NSW Government, *Submission No. 35*, p. 44; see also Prof. A. Stewart, *Submission No. 69*, p. 12.

33 DEWR, *Exhibit No. 25*, p. 13; Mr G. Blyth, CCI WA, *Transcript of Evidence*, 20 May 2005, p. 12.

34 The Treasury, *Submission No. 73*, p. 4.

35 Job Watch, *Submission No. 23*, p. 5; Ai Group, *Submission No. 49*, pp. 7-8.

entitlements protections. The concept is not recognised as part of common law in Australia.[36]

4.39 Joint employment is primarily used to establish liability at law for benefits or entitlements for employees in circumstances where an employer is unable or unwilling to pay the entitlements. Under these circumstances if another entity can be found to be a 'joint employer' then recovery action can be taken against that entity.[37]

4.40 In the DEWR discussion paper, a number of concerns about joint employment and employer's responsibilities under a joint employment arrangement are identified, including:

- payment of the employee's wage;
- payment of taxes – PAYG and GST federally and the payment of payroll tax at a state level;
- liability for insurance;
- payment of superannuation;
- dispute resolution;
- discrimination law;
- workplace health and safety; and
- copyrights, patents and designs.[38]

4.41 In addition, joint employment raises issues for the employee. In particular, it becomes unclear to which employer the employee owes duties of good faith and loyalty. It is also unclear what employees should do if they receive conflicting directions from their joint employers.[39]

4.42 The DEWR discussion paper does not support the introduction of the concept of joint employment into Australian law in any jurisdiction.[40]

4.43 Some submissions to the Committee did give qualified support to the notion of joint employment.[41]

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36 DEWR, *Exhibit No. 25*, p. 32.

37 Qld. Government, *Submission No. 66*, p. 39.

38 Adapted from DEWR, *Exhibit No. 25*, pp. 32-33.

39 DEWR, *Exhibit No. 25*, p. 33; ACTU, *Submission No. 60*, p. 14.

40 DEWR, *Exhibit No 25*, pp. 32-33.

41 Job Watch, *Submission No. 23*, p. 12; NUW, *Submission No. 47*, p. 7; ACTU, *Submission No. 60*, p. 16.

4.44 Job Watch suggested that joint employment may assist in preventing host employers from avoiding responsibility for the unfair dismissal of labour hire workers. However, they caution that this may not be a practical option for most employers as any claim against a host employer would most likely involve a costly jurisdictional hearing.[42] ACTU assert that joint responsibility should be recognised in respect of OHS and unfair dismissal proceedings.[43] National Union of Workers (NUW) state that joint employment as established in the US, if given statutory recognition in Australia, may relieve many problems experienced by labour hire workers.[44]

Consistency in definition

4.45 This section has provided a review of three different approaches to improving consistency and clarity in the identification of employees or independent contractors.

4.46 The Committee can see the benefits of redefining the employment relationship to incorporate known business structure arrangements, however, has concerns regarding manipulation of a statutory definition. The Committee's view is to retain the common law position but supplement it with components of the PSI tests. This would provide greater consistency with the ATO rulings.

4.47 The Committee suggests the exclusion of one component, that is, the timeframe for assessment of the 80/20 rule. It is suggested that other tests remain as their removal would not improve consistency across legislation and would add to the confusion.

4.48 The Committee is aware that this is not a clean and simple solution and it is noted that there is dissent within the Committee on these recommendations. However, the recommendation does narrow the application of the status of independent contractors and should reduce the likelihood of the creation of sham arrangements. Artificial contracting arrangements are discussed in more detail in the next chapter.

42 Job Watch, *Submission No.* 23, p. 12.

43 ACTU, *Submission No. 60*, p. 3.

44 NUW, *Submission No. 47*, p. 7.

Recommendation 2

The Committee recommends that the Australian Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors.

Recommendation 3

The Committee recommends that the Australian Government, when drafting federal legislation, in addition to the common law position adopt components of Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors.

Recommendation 4

The Committee recommends that the Australian Government, in conjunction with State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying independent contractors. The Committee recommends that this is achieved by, in addition to the common law position, adopting components of Australian income tax assessment alienation of personal services income legislation tests in the drafting of relevant state and territory legislation.

Training and Development – skills shortages

4.49 One of the major issues facing the Australian economy is ensuring a sufficient supply of skilled workers to meet industry demands. It has been suggested that the increased use of labour hire and contractors may contribute to a lack of investment in training. This may in turn impact upon a wider skills shortage which is a major concern to state and federal governments.[45]

45 Vic. Government, *Submission 71,* p. 19; ACTU, *Submission No. 60*, p. 21; CFMEU – Mining and Energy Division, Northern Branch; *Submission No. 18*, p. 11.

4.50 Skill shortages exist when employers are unable to fill or have considerable difficulty in filling vacancies for an occupation. It may also include difficulty in recruiting for specialised skill needs within that occupation, at current levels of remuneration and conditions of employment. Skill shortages are occurring in a range of industries, across a number of trades and professions.[46]

4.51 It is reported that the option of contracting out labour, the general push to 'downsize', and adoption of 'just-in-time' management techniques, has lead to employer reluctance to take on trainee labour whether directly or through labour hire agencies. AMWU told the Committee that:

> …the overwhelming majority of evidence supports the conclusion that the growth of outsourcing (both labour hire and contracting) has had a negative impact on skills formation. The national skills shortage, especially in the manufacturing sector, is partly attributable to this phenomenon.[47]

4.52 As mentioned in Chapter 3, one of the main benefits to a host business for using outsourced labour is reduced costs and risks of direct employment of staff. This includes reducing costs of training and developing employees.[48]

Skill training provided to labour hire workers

4.53 A host business uses a labour hire agency to provide supplementary labour. Evidence to the Committee considers it unlikely that a host business would invest money in the training of supplementary labour, as companies prefer to invest in their ongoing workforce.[49]

4.54 However, many labour hire firms rely on the host business to provide their employees with training. It can be difficult for a labour hire agency to provide training due to the mobility of its workers. Profit

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46 SKILLED Group, *Submission No. 52*, p. 11; Queensland Nurses' Union, *Submission No. 24*, p. 4; MBA, *Submission No. 22*, p. 9.

47 AMWU, *Submission No. 46*, p. 63.

48 Qld Government, *Submission No. 66*, p 16.

49 CFMEU, *Submission No. 5,* Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, pp. 5-6; Hall R, 2005, Try Before You Buy, *About the House*, Issue 23, May 2005, p. 32.

margins may also be low, as there is no guarantee of a return on the investment in training.[50]

4.55 The increasing use of labour hire has been identified as contributing to lower levels of employee commitment as well as employer commitment to training. The labour hire workers themselves may feel little obligation to undertake training.[51]

4.56 Access to training and skills development can be directly influenced by a worker's labour market position. Research on the delivery of training to casual and part-time workers has shown reduced access to training and skills development and skills based career paths.[52]

4.57 The view that labour hire firms do not invest in training is reinforced by the findings of a RMIT study in 2003 titled *On-hired Workers in Australia: Motivations and Outcomes.* This study showed that only about 50 per cent of labour hire employers surveyed provided any training to their employees.[53] It was reported that 61 per cent of RCSA members and 48 per cent of non-members consistently provide safety induction training to their labour hire workers.[54]

4.58 Furthermore, the RMIT study identified that only 48 per cent of labour hire employees stated that they had received formal training from their employer. The labour hire industry does not invest significantly in trade training with 88 per cent of labour hire employers surveyed stating that they rarely or never engaged apprentices.[55] The percentage of labour hire employees receiving training is well below the average for all employees. In 2002, 81 per cent of all Australian employers provided some training for their employees.[56]

4.59 Independent contractors associated with APESMA state that almost half participated in less professional development as an independent

50 CFMEU, *Submission No. 5*, Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, pp. 5-6; Qld Government, *Submission No. 66*, p. 28.

51 Hall R, 2000, Outsourcing, contracting-out and labour hire: implications for human resource development in Australian organizations*, Asia Pacific Journal of Human Resources*, vol. 38, no. 2, p. 23.

52 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 7.

53 Qld Government, *Submission No. 66*, p.28.

54 RCSA, *Exhibit No. 26*: Brennan, L, Vales, M and Hindle, K, *On-hired works in Australia: Motivations and Outcomes,* RMIT University, Swinburne University and Customer Focus Research, 2003, pp. 79-80.

55 Qld Government, *Submission No. 66*, p.28.

56 ABS, *Employer Training Expenditure and Practices, 2001-02,* Australia, 2003, Cat. No. 6362.0, Table No. 1, p. 13.

contractor than as an employee.[57] MBA state that traditional apprenticeships in carpentry have given way to contractors with more limited skills due to the skills shortage.[58] They suggest that there needs to be a way to increase and broaden those contractors' skills.

Responsibility for training

4.60 There is a wide diversity of views as to the nature and extent of training provided by labour hire companies. The shortage of skills across Australia is not exclusively caused by the growth of the labour hire industry or the growth of casual employment across the economy. It is claimed by a number of the larger labour hire firms that they spent significant resources on ensuring their staff were properly trained to undertake assignments.[59]

4.61 Examples of larger labour hire agencies confirming their commitment to training and skill development include:

- RCSA — there are several RCSA members who undertake their own training and apprenticeship programs. In some cases, a labour hire agency may partner with the host business, for example the telecommunications sector, and train the labour hire worker to a particular certificate level required of the worksite.[60]
- Adecco — the majority of its employees are required to meet strict competency standards and have experience in a vast array of workplaces. They state their workers are often more skilled and productive than clients' employees.[61]
- Skilled Engineering — has a strong record of training and development on traineeships and apprenticeships and other training programs.[62]

4.62 There are also many group training schemes that provide apprenticeships for workers within a labour hire setting. This form of

57 APESMA, *Submission No. 7,* p. 14.

58 MBA, *Submission No. 22*, p. 10.

59 For other debate on this issue see also Qld Government, *Submission No. 66*, p. 28; Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria*, Interim Report, December 2004, pp. 59-65.

60 ACCI, *Submission No. 25,* p. 50.

61 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 25 citing Adecco submission, p. 10 to NSW Labour Hire Task Force Inquiry.

62 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 25 citing Skilled Engineering submission, p. 8 to NSW Labour Hire Task Force Inquiry.

employment includes labour hire workers that are contracted out to a number of employers during the course of their apprenticeships.[63]

4.63 A positive example of training in the labour hire industry is GTOs. GTOs have additional responsibilities for their workers. The GTO is the employer, and as such is responsible for the payment of wages and other employment entitlements. In addition to brokering the placement, the GTO is then responsible for managing and co-ordinating the on and off-the-job training. It may even be the approved provider of the off-the-job training inspecting the workplace to ensure conformance to OHS requirements.[64]

4.64 MBA is supportive of group training schemes and do not believe that there is a need for further regulation on GTOs.[65]

4.65 However, as training is the objective of group training schemes, other labour hire organisations' training practices need to be examined.

4.66 It was stated that labour hire firms need to have a greater responsibility to ensure they play their part in the provision of training. A number of recommendations were put to the Committee, to increase the occurrence and quality of training that a labour hire worker received.

4.67 One suggestion to the Committee was that labour hire agencies be required to detail in their annual reports the provision of training to workers. Another suggestion was that a labour hire worker could each year, be entitled to 5 days of paid industry and OHS training. This would enable them to maintain contact with industry trends and competency standards.[66]

4.68 Best practice in this area provides an example of how labour hire companies can combine the training of their workforce with the contracting out of that workforce to their clients. An example of a labour hire agency applying a best practice model is the:

> … creation of a dedicated unit for the prevention of workplace injuries staffed by qualified OH&S Co-ordinators

63 GTA, *Submission No. 36,* p. 4.

64 GTA, *Submission No. 36*, pp. 3-4, 9-10.

65 MBA, *Submission No. 22*, p. 11.

66 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 20; TWU, Vic./ Tas., *Submission No. 56*, p. 28.

and the provision of OH&S induction training to labour hire employees.[67]

4.69 The *National Industry Skills Initiative*, part of the National Skills Shortages Strategy, suggested the formation of an Industry Committee, which should consist of major industry bodies. This industry group could consult the Department of Education, Science and Training (DEST), labour hire companies, state training agencies, RTOs, and GTOs to identify ways to facilitate a greater role in skills development, particularly in increasing the take up of New Apprenticeships.[68] The National Industry Skills Initiative suggested that ANTA should form this Industry Committee. With the new administrative arrangements following the transfer of ANTA responsibilities to DEST, the Committee considers that this activity should continue.[69]

4.70 GTA entered into a partnership with ACCI in 2004 to take part in the government's national skills shortage strategy. They have completed a project, which examined ways which GTOs could better assist older workers as well as those returning to work from injury undertake further skills training.[70]

4.71 APESMA acknowledge the responsibility that independent contractors have for their own professional development. They suggest that the Commonwealth should fund scholarships and competitive funding schemes for their members to promote and enable greater access to professional development for independent contractors and labour hire workers.[71]

4.72 The Committee considers that there needs to be greater emphasis on the importance of skills development in labour hire arrangements. Pursuing initiatives in the labour hire industry through the National Skills Shortage Strategy would be an appropriate response. RCSA may be able to provide guidance and assistance in developing such strategies and should be included in consultations.

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67 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 32 citing Manpower submission pp. 4-5 to NSW Labour Hire Task Force Inquiry.

68 Australian Government, National Industry Skills Initiative, Engineering Industry, *Industry Skills Action Plan*, p. 6, accessed 27 June 2005, <www.getatrade.gov.au/documents/action_plans/engineering_ action_plan.pdf>.

69 From 1 July 2005, the responsibilities and functions of ANTA were transferred to DEST; accessed 14 July 2005, <www.dest.gov.au/sectors/training_skills/policy_issues_reviews/key_issues/nts/#Background>.

70 Mr J. Barron, GTA, *Transcript of Evidence*, 12 May 2005, p. 23.

71 APESMA, *Submission No.* 7, p. 14.

Recommendation 5

The Committee recommends that the Australian Government Departments of Employment and Workplace Relations, and Education Science and Training, through the National Skills Shortage Strategy, develop a program of skills development and a best practice guide targeted at the labour hire industry. The development of this program and guide should be in consultation with the Recruitment and Consulting Services Association as the peak industry body, labour hire agencies and relevant employee bodies.

4.73 Australian Independent Contractors Agency further suggests that the whole area of vocational education needs to be re-examined for independent contractors as the apprenticeship system requires the establishment of an employment relationship.[72]

4.74 Some professional associations already provide access to accredited training and development pathways for members. The Committee is encouraged by these developments.

Occupational health and safety

4.75 Significant concerns were reported to the Committee regarding the increased risk of injury for labour hire workers and independent contractors. One major issue was the dispersal or unclear responsibility for OHS matters. Inadequacies in legislation and pursuing compliance are additional problems identified.

Background

4.76 Australia's labour force consists of ten million workers.[73] There are at least 2 000 work-related deaths each year. Each year, about five per cent of workers will suffer a work-related injury or disease. In 2002–2003, there were around 134 000 compensated injury and disease claims resulting in one week or more lost from work.[74]

72 AICA, *Submission No. 64*, p. 18.

73 ABS, *Labour Force*, Cat. No. 6202.0, June 2005, p. 3.

74 NOHSC, *Annual Report 2003–2004*, p. 8.

4.77 While data from the National Occupational Health and Safety Commission (NOHSC) shows there have been reductions in the incidence of work-related death and injury or disease claims over the recent years, significant numbers of Australians are still killed and injured every year at work. In 2001, Australia's fatality incidence rate was 2.6 employees per 100 000 workers. The economic cost of poor OHS performance in Australia was reported in 2000 to be about $31 billion a year.[75]

4.78 Some evidence to the Committee states that the workplace health and safety of labour hire workers is not as good as that of direct employees. Submissions referred to recent reports to support these assertions including the NSW Labour Hire Taskforce Report and the report *Changing Work and OHS: The Challenge of Labour Hire Employment*.[76]

4.79 When analysing workers' compensation claims in Victoria, it was found that labour hire workers are more likely to be injured than direct employees, and their injuries are often more severe. This conclusion is consistent with other Australian and international evidence.[77]

4.80 There are various reasons, such as being less experienced on the work site and/or being a younger worker, that may increase the prevalence of labour hire workers' injuries. Direct hire employees may be given access to more training and be given a transition period into the job to better learn the processes and avoid potential hazards.[78] Labour hire workers are sometimes contracted to perform work in industries that are more hazardous or at more precarious times of the production process.[79]

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75 NOHSC, 2004, *Fatal Occupational Injuries - How does Australia compare internationally*?, Canberra, pp. 6, 15.

76 Qld Government, *Submission No. 66*, p. 27, citing Underhill, E, 2003, *Changing Work and OHS: The Challenge of Labour Hire Employment*; Qld Council of Unions, *Submission No. 41*, p. 8; Parliament of Victoria, Economic Development Committee, 2004, *Labour Hire Employment in Victoria*, Interim Report, December 2004, p. 37.

77 Qld Government, *Submission No. 66*, p. 27, citing Underhill, E, 2003, *Changing Work and OHS: The Challenge of Labour Hire Employment* Vic. Government, *Labour Hire Employment in Victoria*, Interim Report, December 2004, pp. 37-38.

78 Qld Government, *Submission No. 66*, pp. 27-28; AMWU, *Submission No. 46*, p. 44; Qld Council of Unions, *Submission No. 41*, p. 8;

79 CFMEU – Mining and Energy Division, Mr K. Endacott, *Transcript of Evidence*, 30 March 2005, p. 47.

4.81 It was reported that contractors also face a significantly higher risk of serious injury and death:[80]

> A growing reliance on sub-contracted supplier networks, including labour hire, generates complex inter-organisational arrangements that can be abstruse, opaque and expensive to regulate. It creates delay in following up on accidents.[81]

4.82 Higher rates of labour hire injuries have also been identified due to the higher proportion of younger workers.[82] One of the roles of GTOs is to ensure that the apprentice is fully versed in OHS and understands their responsibilities. They receive induction training by the GTO and this responsibility comes under the code for New Apprenticeships Centres—a Commonwealth code of the rights and responsibilities of the employers and the apprentices and trainees.[83]

4.83 However, other evidence to the Committee does not support concerns raised about labour hire arrangements necessarily leading to more injuries. RCSA states that labour hire providers, especially the larger organisations, work with clients to ensure compliance with occupational health and safety legislation and that their workers are placed in a safe and secure environment.[84]

Legislation and regulations

4.84 One of the issues facing Australian OHS regulations is the changing composition of the Australian labour market. As more flexible working arrangements have emerged, firms have increasingly used subcontracting, outsourcing (labour hire workers), franchising, home-based work and downsizing, leading to more casual, part-time and contingent forms of work, self-employment and small business. However this flexibility is currently not reflected in the myriad of OHS legislation and regulations in Australia.

4.85 The Australian, state and territory governments each administer their own OHS Acts and workers' compensation schemes. There are ten principal OHS statutes across Australia, one in each state and

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80 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 25.

81 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 57 citing WorkCover NSW submission p. 3 to NSW Labour Hire Task Force Inquiry.

82 Qld Government, *Submission No. 66*, p. 5.

83 Mr J. Priday, GTA, *Transcript of Evidence,* 12 May 2005, p. 21.

84 Small Business Development Corporation, *Submission No. 58*, p. 8; RCSA, *Submission No. 67,* p. 12; RCSA, *Submission No. 67.1,* pp. 9-11.

territory, and two of the Australian Government (one relating to Australian Government employees and the other relating to seafarers). See Appendix F for a list of each state and territories OHS and Workers' Compensation regulatory bodies. [85]

4.86 The principal objective of OHS regulation is to prevent injury and illness. All jurisdictions have specific OHS legislation which establishes a general duty of care that is imposed on employers, the self employed, persons in control of premises where work is undertaken, occupiers, suppliers and employees.

4.87 All OHS Acts provide regulations to cover such matters as working in confined spaces, plant design and use, electrical hazards, manual handling, risk management, consultation and training. Failure to comply with regulations is a breach of the relevant OHS Act and may result in penalties being applied.

4.88 One of the issues identified in the Productivity Commission Report, titled *National Workers' Compensation and Occupational Health and Safety Frameworks* is that across jurisdictions, OHS legislation uses different definitions for an 'employee'.[86]

4.89 While the definitions do not generally appear to undermine the nature of the duties under OHS legislation, there are significant variations between jurisdictions and this could result in different interpretations of employer responsibilities. This may impact on information collected on work-related injury and disease.[87]

4.90 The problem of defining a worker has not been seen as a fundamental issue for OHS legislation as it is in other areas. Recent reviews have, nonetheless, suggested that definitional changes could be considered. For example, in an issues paper for the review of the Queensland *Workplace Health and Safety Act 1995*, the Department of Industrial Relations (2001) noted:

> One possible solution to avoid the complexity of 'deeming' and any associated issues is to abolish the concept of imposing an obligation on an 'employer' and substitute

85 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 50-51.

86 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 63-64.

87 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 63-65; Courier, Taxi & Truck Association, *Submission No. 50*, pp. 9-10.

> instead the notion of placing an obligation on all 'persons' to ensure the health and safety of the person's workers [more broadly defined] …[88]

4.91 However, it is not certain that deeming would alleviate issues of definition or responsibility. Instead, deeming may create confusion about the duty of care, its scope and to whom it is owed. Deeming laws may allow particular types of persons to be overlooked in OHS legislation. For example, the identification of the 'employer' as being in control of the worksite means that others who are not employers, but who exercise some form of control over a worksite, may escape their duty of care.[89]

4.92 Evidence suggests that current OHS administration is not necessarily keeping pace with changing working arrangements. The National Research Centre for OHS Regulation (NRCOHSR) concluded that there is a need for OHS regulators to pay greater attention to work relationships outside the traditional employment relationship.[90] The Small Business Development Corporation also supports these findings.

4.93 The NRCOHSR recommended that regulators need to develop standards, guidance material, inspection programs and enforcement strategies that accommodate subcontracting, labour hire, home-based work and franchise arrangements.[91]

National OHS Strategy

4.94 On 24 May 2002, the Workplace Relations Ministers' Council (WRMC) endorsed the release of *The National OHS Strategy 2002–2012*. The Strategy was agreed to by all Australian governments, as well as ACCI and ACTU. The Strategy aims to work cooperatively over a ten-year period on national priorities for improving OHS, and to achieve a set number of national targets for reducing the incidence of workplace deaths and injuries.[92]

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88 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 62-63.

89 Small Business Development Corporation, *Submission No. 58*, p. 7.

90 Small Business Development Corporation, *Submission No. 58*, pp. 7-8.

91 Small Business Development Corporation, *Submission No. 58*, p. 8.

92 National Occupational Health and Safety Commission, *National OHS Strategy 2002 – 2012,* accessed 7 July 2005, <www.nohsc.gov.au/nationalstrategy/Strategy2sep.pdf>.

Responsibility

4.95 It was reported that labour hire agencies and host businesses have a joint responsibility under OHS legislation to ensure the safety and health of labour hire workers. Some organisations also stated that OHS Acts may not offer clear guidance on how responsibilities are split between the labour hire agency and the host business. [93]

4.96 Evidence to the inquiry indicated that there appears to be confusion about responsibilities between the labour hire agency and the host business. This uncertainty at times has meant that either party may not acknowledge OHS responsibilities, as it could be assumed it is the other party's responsibility.[94]

4.97 In Queensland, GTOs are provided with an additional layer of protection. The Queensland OHS legislation prescribes that should there be an accident, it is ultimately the host employer who is liable for the incident. The host employer presumably bears responsibility in terms of any punitive arrangements that are built into the legislation. In other jurisdictions, where there is no statutory definition, there is a shared responsibility.[95]

4.98 The Queensland OHS legislation 'public safety' obligation extends the applicability of obligations on host businesses to labour hire workers.[96] Section 29A of the Queensland *Workplace Health and Safety Act 1995* describes that:

> As well as any obligation the person may have under section 28 to ensure the person's own employees, if any, are not exposed to risks to their health and safety, the person also has, under this section, an obligation to ensure the labour hire employees are not exposed to risks to their health and safety while they are performing the work activity.[97]

4.99 ACCI reiterates the view that all the parties should have a duty of care under OHS legislation—both the business that has contracted the labour hire agency to provide the worker, as well as the labour hire agency itself. Each bears a separate duty of care.

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93 AICA, *Submission No. 64*, pp. 13-15.

94 AMWU, *Submission No. 46*, p. 38; Mr D. Cameron, AMWU, *Transcript of Evidence*, 31 March 2005, p. 80.

95 Mr J. Priday, GTA, *Transcript of Evidence*, 12 May 2005, pp. 18-20.

96 Queensland Government, *Submission No. 66*, p. 26.

97 Queensland *Workplace Health and Safety Act 1995*, section 29A; example of obligation under this section, p. 25.

> Occupational health and safety needs to be taken seriously by all persons who provide labour services or who engage for the provision of labour services. The rights and obligations, though, need to be independently held—that is, the employer needs to have their obligations; employees, their obligations; contractors, their obligations; and so on for manufacturers, designers and the like, right through the supply chain. It should not be available for one party to transfer their obligations to another party.[98]

4.100 The host business under general OHS provisions bears responsibility for the health and safety of labour hire workers on sites controlled by them. They must ensure that persons outside their direct employment are not exposed to risks to their health or safety.[99]

> The key in applying OH&S principles to this scenario is to make sure that the duty of care is based on what is reasonable and what is practical in each of those circumstances. Obviously, whilst it is not the direct employer of the individual, the business will still have a duty of care to ensure that the individual employee of the labour hire company working in their premises is working in a safe environment and is not exposed to unsafe systems of work and the like. The business, in practice, has more control over those issues—and it is those issues of control which will affect whether it meets its duty of care.[100]

4.101 The labour hire agency, which supplies the labour of a worker to a client business, is considered that worker's employer, except where there is a direct contract between the worker and the client.[101] Independent Contractors Australia states that independent contractors have clear OHS responsibilities under all relevant state OHS legislation.[102]

4.102 Organisations need not only to acknowledge their duty of care, but they need to ensure that they carry out their responsibilities under a duty of care. Duties imposed on a labour hire agency may include:

- ensuring their compliance with state OHS legislation;
- conducting hazard identification on the work site;

98 Mr P. Anderson, ACCI, *Transcript of Evidence,* 26 April 2005, p. 14.

99 CFMEU, *Submission No. 5,* Appendix 11: NSW Labour Hire Task Force Report, p. 56.

100 Mr P. Anderson, ACCI, *Transcript of Evidence,* 26 April 2005, p. 14.

101 Mr P. Anderson, ACCI, *Transcript of Evidence,* 26 April 2005, pp. 14-15.

102 ICA, *Submission No. 20*, p. 14.

- informing the labour hire workers of these hazards;
- not supplying, or withdrawing workers from sites that do not comply with or have changed their procedures until they can be reassessed;
- ensuring that the worker is provided with appropriate training to undertake the duties of the job; and
- ensuring the work is properly supervised and that inspections of the workplace have been carried out.[103]

4.103 To fulfil the requirements of providing information to the worker about their responsibilities and safety requirements, most labour hire agencies provide induction training. Induction training usually involves a safety induction and a company induction including the workers and the company's responsibilities. The company induction provides the worker with additional information relevant to their placement, including privacy rights, workplace bullying as well as information on their conditions and entitlements.[104] However, evidence suggests that this does not always occur.[105]

4.104 It is important for a labour hire agency to ensure that workers receive all relevant safety information for the sites they work on, as some labour hire workers may attend multiple sites with multiple practices and hazards.[106]

4.105 One of the recommendations in the Parliament of Victoria interim report of *Labour Hire Employment in Victoria* was that an industry-wide registration system is established in Victoria aimed specifically at improving the OHS performance of labour hire companies. The report explained that the key function of the registration scheme must be the development of minimum labour hire standards and procedures, which it says could be expressed in a code of practice.[107]

4.106 Some labour hire agencies have made considerable efforts to be recognised as being OHS responsible. The RCSA in their survey cite examples of labour hire agencies not allowing their workers to attend a host business where safety issues have been identified and not

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103 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 27.

104 Company Solutions (Australia) Pty Ltd, *Submission No. 28*, p. 3.

105 Mr J. Webster, *Transcript of Evidence,* 20 May 2005, p. 55; AMWU, *Submission No. 46*, p. 40.

106 CFMEU – Mining and Energy Division, Northern District Branch, *Submission No. 18*, p. 6.

107 Vic. Government, *Submission No. 71*, p. 5.

addressed.[108] There is a promotional advantage with at least one organisation awarded OHS accreditation under AS/NZS 4801, which is the Australian and New Zealand Safety Standard.[109]

4.107 The Committee emphasises that while some labour hire agencies have experienced excellent health and safety results, overall the perception of the industry record is generally reported as poor. One key to managing OHS risk is training. The other is enforcing and ensuring compliance with regulations.

Recommendation 6

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, improve occupational health and safety in the labour hire industry through the following national initiatives:

- **improving the collation of data on injury rates for labour hire workers compared to direct employees;**
- **requiring appropriate occupational health and safety training for workers by labour hire agencies and host businesses; and**
- **monitoring and enforcing compliance with occupational health and safety regulation.**

Recommendation 7

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, develop initiatives to achieve greater understanding and more clearly delineate responsibilities among labour hire agencies and host businesses in relation to occupational health and safety.

4.108 The pressure on independent contractors to meet production targets is considered to affect safety performance. Examples in the transport,

108 RCSA, *Submission No. 67.1*, pp. 9-10.

109 SKILLED Group, *Submission No. 52*, p. 9.

building and construction, clothing outworkers, and mining industries suggest that work targets and payment structures conflict with the ability to adhere to safety requirements.[110]

4.109 It has been argued that the competitive pressures of contracting results in poorer occupational health and safety outcomes. This is principally because:

- contracting is often a 'payment by results' system which is based on the amount of work, not the time required, thereby encouraging contractors to minimise time in order to maximise productivity and profit;
- contractors are, or work for, small businesses, which are less likely to have health and safety resources, knowledge or information; and
- contractors often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused.[111]

Recommendation 8

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, improve occupational health and safety for independent contractors through the following national initiatives:

- **improving the collation of data on injury rates for independent contractors compared to direct employees**
- **requiring appropriate occupational health and safety training for independent contractors; and**
- **monitoring and enforcing compliance with occupational health and safety regulation.**

110 TWU – Vic./Tas. Branch, *Submission No. 56*, pp. 13-17; TWU – NSW, *Submission No. 40*, p. 19, para. 47; NSW RTA, *Submission No. 75*, pp. 6-7; Vic. Government, *Submission No. 71*, p. 7; Qld Government, *Submission No. 66*, pp. 23-24.

111 Qld Government, *Submission No. 66*, pp. 23-24.

Recommendation 9

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council:

- **examine how incentives for independent contractors may discourage compliance with occupational health and safety requirements; and**
- **develop initiatives to ensure greater understanding among independent contractors and host businesses of respective responsibilities in relation to occupational health and safety.**

Workers' compensation

4.110 OHS legislative provisions and workers' compensation regulations are not uniform across Australia. Jurisdictions base their definition of the work relationship that should be covered by workers' compensation schemes work on the common law definition of employee. However, in the state and territory workers' compensation legislation, each jurisdiction supplements the common law definition through the use of a unique set of inclusions and exclusions.[112] (Deeming provisions are discussed later in this and the next chapter).

4.111 As an example, the Queensland *Workplace Health and Safety Act 1995* considers a labour hire organisation that hires a worker to a client company to be the legal employer of the worker. While the labour hire agency is viewed as the legal employer, the client has equal responsibility for the worker when the worker is working for them.[113]

4.112 In addition, the definition of worker in the Queensland *Workers' Compensation and Rehabilitation Act 2003* was amended to introduce a 'results test' which determines who is a worker and who is an employer. The 'results test' closely aligns with the Commonwealth's PSI and was introduced to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker.[114]

112 Insurance Council of Australia, *Submission No. 11*, p. 1.

113 Ms D. Ralston, Qld Council of Unions, *Transcript of Evidence,* 12 May 2005, p. 10.

114 Qld Government, *Submission No. 66,* pp. 5-6.

4.113 In circumstances where labour hire workers are deemed to be the employees of the labour hire agency that employs them, the labour hire agency would be entirely responsible for workers' compensation premiums, as well as carrying a legal responsibility (shared with the host employer) to provide a safe workplace.

4.114 One issue raised was that the labour hire agency often has little leverage to influence the safety performance of host businesses. An additional effect on premiums is whether the business is willing or able to provide other duties to facilitate the early return to work of workers injured whilst working on their premises.[115]

4.115 Evidence to the Committee suggested that one of the reasons employers use labour hire or contracting arrangements is in part to reduce or avoid their obligation to provide workers' compensation coverage to employees. Currently in some states and territories, it was reported that workers' compensation benefits for workers employed through sub-contracting or labour hire arrangements are reduced. Some contract workers are effectively denied workers' compensation coverage entirely.[116]

4.116 Ensuring a clear definition, applicable across all state and territory jurisdictions, would assist clarify the workplace safety arrangements of independent contract or labour hire workers.[117] The Australian Lawyers Alliance supports the adoption of a nationally consistent approach to help ensure that all workers are protected in some way.[118]

Workers' compensation responsibilities

4.117 Broadly, there are two forms of legal protection available to workers who suffer work related injury while employed as a contractor, or in a labour hire arrangement: workers' compensation and public liability coverage.

4.118 The definitions of employer and employee hold great significance to businesses that use independent contractor and labour hire arrangements. The identification of the employer is used to determine the level of premiums to be paid and, where this is unclear, could lead to underpayment of premiums. This has the potential to disadvantage certain industries or businesses by the payment of higher premiums.

115 Insurance Council of Australia, *Submission No. 11*, p. 3

116 Australian Lawyers Alliance, *Submission No.* 55, p. 3.

117 Insurance Council of Australia, *Submission No. 11*, p. 3.

118 Australian Lawyers Alliance, *Submission No. 55*, p. 3.

Additionally this may lead to the avoidance of responsibility for rehabilitation and return to work.

4.119 In addition to statutory benefits, some states also allow workers to sue negligent employers at common law. The schemes all provide different levels of statutory benefits and have different rules allowing access to common law, some allowing no common law access at all. The schemes with common law all have mechanisms that control access and limit total damages recoverable.[119]

4.120 The Insurance Council of Australia identified concerns regarding cost shifting from workers' compensation to liability insurance. They stated that when a claim is made for an injured person, that person is for all relevant purposes considered an employee of the labour hire company, and hence covered under workers' compensation. However, the workers' compensation insurer seeks to claim from the liability insurer who covers the host company. It is very difficult for the liability insurer to deny a claim when the labour hire employee is on the host company's premises and under that organisation's supervision.[120]

4.121 One solution offered to the Committee would be to alter workers' compensation legislation to allow for host businesses to be able to add labour hire workers or contract workers to their workers' compensation cover and pay a premium accordingly.[121]

4.122 Under Western Australia's "no fault" workers' compensation scheme, employers are protected from claims for injuries incurred by workers in the workplace. As the workers' compensation legislation extends the definition of 'worker' to include independent contractors and labour hire workers, public liability claims for injuries can only be brought against a company if the worker can prove negligence by the employer. Consequently it was stated that public liability claims by labour hire workers are not an issue in Western Australia.[122]

4.123 The Small Business Development Corporation (SBDC) believe that the WA workers' compensation system offers certainty for independent contractors and labour hire workers. The system is generally clear in identifying who is responsible for workers' compensation if a contractor is working on site or through a labour hire company. SBDC

119 Australian Lawyers Alliance, *Submission No. 55*, pp. 3-4.

120 Insurance Council of Australia, *Submission No.* 11, p. 5.

121 Insurance Council of Australia, *Submission No.* 11, p. 6.

122 Small Business Development Corporation, *Submission No. 58*, p. 11.

recommends that these principles should be common through all Australian jurisdictions.[123]

4.124 The RCSA expressed concern at not being able to access data from workers' compensation authorities to enable greater examination of industry, employer and employment type trends.[124]

4.125 Cross-border issues regarding workers' compensation were raised with the Committee. These issues were identified in the former House of Representatives Standing Committee on Employment and Workplace Relations report *Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes*.[125]

4.126 The Australian Government responded positively to most of the recommendations in the report and identified that there is merit in considering a national standard that covers the widest possible number of workers.[126]

4.127 Submissions to this inquiry have also recommended that mutual recognition of existing workers' compensation be applied throughout Australia. The NFF called on state governments to address workers' compensation mutual recognition and for NOHSC, and the new Australian Safety and Compensation Council (ASCC) to examine cross-border workers' compensation arrangements to ensure greater consistency.[127]

4.128 The Productivity Commission, in their report *National Workers' Compensation and Occupational Health and Safety Frameworks*, identified a number of areas where national consistency could be improved. The Australian Government, in its response to the Productivity Commission report, announced the establishment of ASCC on 18 May 2004.[128]

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123 Small Business Development Corporation, *Submission No. 58*, p. 11.

124 RCSA, *Submission No. 67.1*, pp. 7-9.

125 Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes*, June 2003, Canberra.

126 Australian Government, *Response of the Australian Government to the Report of the House of Representatives Standing Committee on Employment and Workplace Relations,* Tabled 17 November 2004, pp. 2, 7.

127 Mrs D. Wawn, NFF, *Transcript of Evidence*, 9 May 2005, p. 10.

128 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>;

4.129 ASCC would have representatives from each State and Territory government, as well as the Commonwealth Government, along with employer and employee representatives. The ASCC will develop policy advice on workers' compensation and OHS programs for the WRMC. [129]

4.130 The ASCC is also charged with coordinating national efforts to prevent workplace death, injury and disease and to improve workers' compensation arrangements, and rehabilitation and return to work of injured employees.[130]

4.131 The Committee notes that the issues relating to a common definition of worker and the cross border arrangements that have been identified to this inquiry are expected to be considered by the ASCC and the WRMC. The Committee encourages further work on these issues to address business and worker concerns.

4.132 The Committee notes that addressing these issues will require improved data collection to identify specific labour hire and contractor trends in workers' compensation.

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accessed 21 June 2005; The Hon Kevin Andrews MP Minister For Employment and Workplace Relations and The Hon Peter Costello MP Treasurer, Joint Media Release, *Response To Productivity Commission Report On Workers' Compensation And Occupational Health And Safety*, 24 June 2004. The Committee notes that, as of 4 August 2005, the Australian Safety Compensation Council has yet to be established.

129 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>, accessed 21 June 2005.

130 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>, accessed 21 June 2005.

Recommendation 10

The Committee recommends that the Australian Government Department of Employment and Workplace Relations, through the Australian Safety and Compensation Council review workers' compensation schemes to assess and improve the consistency of employment services categories measuring the injury rates of labour hire workers and independent contractors compared to direct employees.

Labour hire – regulation

4.133 Some employers, unions, committees and governments have generally supported a national system of registration for the labour hire industry to address OHS, training and meeting employer obligations.[131] However, other evidence indicated that there is not a need for the introduction of specific industry regulations, nor that the additional costs associated with extra reporting requirements would lead to specific improvements.[132]

4.134 The labour hire industry is currently voluntarily self-regulated by membership of the RCSA. The RCSA has developed a code of professional practice which has been approved by the ACCC. The RCSA disciplines its members through their Regional Ethics Committee, which may impose sanctions on its members. Sanctions may include fines, suspensions or reprimands. The Regional Ethics Committee may also direct the member to attend education courses and pay all or part of the costs incurred by the RCSA for carrying out the disciplinary action.[133]

131 Skilled Group, *Submission No. 52,* p. 12; AMWU, Mr D. Cameron, *Transcript of Evidence*, 31 March 2005, pp. 68-69; Unions NSW, Mr C. Christodoulou, *Transcript of Evidence*, 30 March 2005, p. 32; ACTU, *Submission No. 60*, pp. 28-29; Qld Government, *Submission No. 66*, p. 43 refers to a code of practice; Victorian Parliament, Economic Development Committee, 2004, *Inquiry into labour hire employment in Victoria,* Interim Report, p. 78.

132 RCSA, *Submission No. 67.1*, pp. 2-7 for an overview of RCSA members complying with industrial requirements; Mr P. Bosa, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 66; Mr. P. Wieske, Personnel Contracting, *Transcript of Evidence*, 20 May 2005, p. 35; DEWR-Toll Transport, *Exhibit No. 79*, p. 9; DEWR – Victorian Automobile Chamber of Commerce, *Exhibit No. 88*, p. 26.

133 Mr A. C. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 21; RCSA Disciplinary & Dispute Resolution Procedure, accessed 28 July 2005, <www.rcsa.com.au/documents/

4.135 However, only members of the RCSA are required to follow this code of practice. RCSA have not supported the introduction of a licensing and regulation system for labour hire agencies at this stage.[134]

4.136 RCSA state that there is little evidence of systematic non-compliance in the industrial relations jurisdiction. While they recognise the need for improved understanding in the areas of discrimination and unfair dismissal, they submit that OHS legislation needs to appropriately recognise the level of control exercised by the parties in the current joint obligations. In their research, non-members of RCSA or the client businesses tend to have lower standards in meeting conditions or compliance requirements.[135]

4.137 Group training schemes, as one component of labour hire, deliver a valuable service in promoting skills development and trade training. National group training standards have been developed for apprentice on-hire. GTA advised that not all states require GTOs to comply with those national standards, however GTA advocate that this should occur for both not-for-profit and for-profit enterprises.[136]

4.138 The Victorian Automobile Chamber of Commerce (VACC) is concerned with additional burdens on group apprenticeship schemes. They note that they are required to comply with state regulation and also voluntarily comply with the national standards. VACC state that additional regulation adds to the cost of compliance and restricts the capacity to provide additional training services.[137]

4.139 Evidence to the inquiry recommended the introduction of a licensing scheme at the Commonwealth level, to ensure that all labour hire operators are subject to the same regulatory framework, and to minimise unfair competition because of the substandard provision of wages, conditions, training and other matters. SKILLED Group supported a licensing scheme to ensure improved performance and an improved perception of the operation of labour hire agencies.[138]

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cfpp/DisciplinaryDisputeResolutionProcedureSummary.pdf>. Code of practice and code of conduct are used interchangeably in the report.

134 Mrs J. Hunt, Manpower Services, *Transcript of Evidence,* 31 March 2005, p. 23; Mr A. C. Cameron, RCSA, *Transcript of Evidence,* 26 April 2005, p. 21.

135 RCSA, *Submission No. 67.1*, pp. 2-13.

136 Mr J. Barron, Group Training Australia, Correspondence, 1 June 2005, pp. 1-2.

137 DEWR-Victorian Automobile Chamber of Commerce, *Exhibit No. 88*, p. 11.

138 ACTU, *Submission No. 60*, p. 28; SKILLED Group, *Submission No. 52*, pp. 9-12; DEWR-Rowley Patrick, *Exhibit No. 66*, p. 9.

4.140 A licensing scheme could include requirements for initial accreditation, subsequent regular reporting, professional standards, referral of matters to appropriate compliance authorities and penalties for non-compliance with licence conditions.[139] State inquiries such as in Victoria and NSW, have advocated a labour hire registration scheme aimed at improving OHS. The Victorian Scheme proposed a focus on risk assessments, workplace induction, provision of personal protective equipment and OHS training.[140]

4.141 A labour hire licensing system could also be used in a capacity to pass on relevant information to appropriate state or federal compliance authorities about OHS, workers' compensation, superannuation, anti-discrimination, wages and conditions or other obligations.[141]

4.142 DEWR commented that responses to their Discussion Paper indicated there was some support to implement a registration system for labour hire agencies, and for the registration system to have an educative function, as well as a code of practice including reference to safety standards.[142]

4.143 In some Australian jurisdictions, employment agents are required to be licensed by the state or territories employment agents act.[143] Employment agents' acts generally cover recruitment and job placement agencies. Some states and territories already have a code of practice under their relevant employment agents acts. Labour hire agencies, however, do not appear to fit the definition of these Acts unless they also carry out recruitment service operations.[144]

4.144 In other responses to DEWR's Discussion Paper, it was suggested that labour hire definitions should be restricted to the commercial arrangement between two companies, where a labour hire agency provides a worker to perform duties for the host business.

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139 ACTU, *Submission No. 60*, p. 31.

140 Parliament of Victoria, Economic Development Committee, 2004, *Inquiry into labour hire employment in Victoria,* Interim Report, pp. xiii-xiv; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 9.

141 Mr G. Hargrave, *Transcript of Evidence*, 27 April 2005, p. 14; Mr D. Cameron, *Transcript of Evidence*, 31 March 2005, p. 68; Mr C. Christodoulou, *Transcript of Evidence,* 30 March 2005, p. 32; Ms S. Burrow, *Transcript of Evidence*, 26 April 2005, pp. 40-42; ACTU, *Submission No. 60*, p. 29.

142 DEWR, *Exhibit No. 25*, pp. 4, 34 referring to other inquiries, Ms C. Waterhouse, DEWR, *Transcript of Evidence*, 16 June 2005, p. 31.

143 Qld - *Private Employment Agents Act 2005*; WA - *Employment Agents Act 1976*; SA- *Employment Agents Registration Act* 1993; ACT - *Agents Act 2003*.

144 ACT Government, *Submission No. 34*, p. 3.

> It should not be taken to include employment agencies or recruitment consultants as those terms [are] generally understood.[145]

Code of practice

4.145 ACTU state that professional standards should be enforced by a code of practice. A labour hire agency code of practice should be developed in association with unions or professional associations and adopted by labour hire operators, peak employer groups and governments.[146]

4.146 ACCC consider that a voluntary industry code of conduct is more flexible than government legislation and can be amended more efficiently in response to industry changes. The code acts as a quality control within a particular industry and would help ensure the consistency and quality of standards across the labour hire industry.[147]

4.147 As discussed in Chapter 3, the RCSA has had a code of practice in place for over ten years. ACCC approved the code in 2003. The code of conduct applies to all RCSA members, but is not enforceable on non-members.

4.148 RCSA's 'Code for Professional Practice' commits association members to a wide range of ethical, professional and operational standards and behaviours. Specific principles in the code address:

- confidentiality and privacy of employee and client information;
- honest dealings with employees and clients;
- truth in advertising;
- proper disclosure of fees;
- proper respect for work relationships with employees and clients;
- respect for the law, including employment law;
- respect for OHS, including risk minimisation and scope for actions by employees; and
- attempts to provide employees with certainty and clarity in terms of their engagement.[148]

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145 DEWR-Rio Tinto, *Exhibit No. 62,* p. 7.

146 ACTU, *Submission No. 60*, pp. 30-31; DEWR-Rowley Patrick, *Exhibit No. 66*, p. 9.

147 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 3, accessed 19 July 2005, <www.accc.gov.au/content/item.phtml?itemId=590196&nodeId=file423617e7b3099&fn=Voluntary+industry+codes_Feb2005.pdf>.

148 ACCI, *Submission No. 25*, pp. 42-43.

4.149 Evidence to the Committee indicated that while there is support for the RCSA code of practice, there has been additional evidence supporting the establishment of an industry-wide national code of practice.[149]

> In the context of the development of the envisaged Code, we note that it should be a national document that comprehensively and consistently deals with the intricacies of the three-way relationships founding labour hire arrangements. We believe that the national Code should encompass the OH&S responsibilities associated with labour hire arrangements.[150]

4.150 ACCC identifies that there are significant benefits in developing and complying with voluntary industry codes of conduct. Some of these benefits include:

- greater transparency of the industry to which signatories to the code belong;
- greater stakeholder or investor confidence in the industry/business;
- ensuring compliance with the [Trade Practices] Act to significantly minimise breaches; and
- a competitive marketing advantage.[151]

4.151 ACCC have recently introduced a system of endorsing voluntary industry codes of conduct in February 2005. ACCC's *Guidelines for developing effective voluntary industry codes of conduct* are designed to help industries improve voluntary compliance with the *Trade Practices Act 1974.*

4.152 A voluntary industry code of conduct sets out specific standards for an industry in its dealings with members and its customers. Its signatories voluntarily agree to the standards.[152] The content of a code could be developed by input from labour hire companies and other stakeholders. It is essentially the responsibility of the labour hire

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149 MBA, *Submission No.* 22, p. 13; ACTU, *Submission No. 60*, pp. 5, 28; Courier, Taxi & Truck Association, *Submission No. 50*, p. 5; Mr S. Ellis, *Submission No. 1*, p. 2; Mrs J. Hunt, Manpower, *Transcript of Evidence*, 31 March 2005, p. 24.

150 MBA, *Submission No.* 22, p. 13.

151 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 3.

152 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 1.

industry to develop solutions and standards appropriate for the industry. [153]

4.153 ACCC guidelines state that an effective code should incorporate a strategy that will raise consumers' awareness of the code and its contents, including its complaints handling provisions. In many cases where a code has failed, ACCC explain that it is because employers or industry members are either unaware of the code or fail to follow it in everyday dealings. ACCC state that it is therefore essential that the code contain a provision requiring employees and agents to be instructed in its principles and procedures.[154]

4.154 If the labour hire industry does not readily accept or comply with a voluntary code of conduct, a mandatory code of conduct could be enforced on the labour hire industry. This could be implemented to ensure that the Trade Practices Act is being adhered to and that the industry is acting in the best interests of its workers and its clients.

4.155 An example of a mandatory code of conduct, which ACCC administer, is in the franchising industry. The Franchising Industry Code of Conduct commenced as a voluntary code, but the voluntary system was perceived to be inadequate to address market failures as there was less than total coverage of the franchising sector.[155]

> The people who needed to be covered were the ones who did not participate. There was a perception that when "push came to shove" the voluntary scheme lacked teeth.[156]

4.156 The Committee notes that were a range of opinions on the need for regulation. A national industry wide voluntary code of practice needs to be developed within a reasonable timeframe that addresses concerns of OHS, skills development, and compliance with employer obligations, for example. Additionally the code should not support any avenue by which labour hire agencies may use artificial contract arrangements to avoid employment responsibilities. It is noted that there is dissent within the Committee on this recommendation.

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153 MBA, *Submission No.* 22, p. 13.

154 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 11.

155 Mr S. Ellis, *Submission No. 1,* p. 2.

156 ACCC, Address given by Chairman Professor Allan Fels, *Administering the Franchising Code of Conduct*, 1 September 1998, p. 1; accessed 19 July 2005, <www.accc.gov.au/content/item.phtml?itemId=97070&nodeId=file42116a44ca236&fn=Administering%20the%20Franchising%20Code%20of%20Conduct.pdf>.

Recommendation 11

The Committee recommends that the Australian Government, through the relevant departments and peak industry bodies, establish a voluntary labour hire industry code of practice. The Committee recommends that the voluntary code is established by 2007, and endorsed by the Australian Competition and Consumer Commission.

In summary

4.157 This chapter reviewed the debate on the need for clarity and consistency in identifying the difference between independent contractors and employees across a range of legislation. Three approaches were considered: the common law approach, a statutory definition, and adopting aspects of the personal service income definition in taxation law.

4.158 The need for greater focus on training and skills development for workers not in direct employment is considered an essential requirement to assist address skill shortages. Evidence suggests that labour hire workers have less access to employer funded training and an increase in the use of labour hire and independent contracting has been a contributing factor in the declining skills of some industries and labour markets.

4.159 The trends suggest that labour hire workers and contractors have poorer safety records, therefore additional resources need to be targeted to ensure compliance with safety regulations. However, a lack of reliable data on OHS, workers' compensation and labour hire and contracting arrangements is hampering a definitive view on the comparative health and safety of direct employees compared to more intermittent workers.

4.160 To improve OHS compliance and ensure that other employer obligations are being met, the introduction of a voluntary industry wide code of practice for the labour hire industry is recommended.